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No. 87-621

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

CALIFORNIA ARCHITECTURAL BUILDING PRODUCTS, INC., a California corp., et al.,

Petitioners,

vs.

[Consolidated]
86-5822
86-5834
86-5974

FRANCISCAN CERAMICS, INC., et al.,

Respondents.

BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF THE CASE:

(a) Omissions in cross-petitioner's Statement.

The cross-petitioner's statement of so-called "uncontroverted facts" (Cross-Petition at pp. 5-6) mentions no misrepresentations made to the Tile Dealers except "routine business correspondence." The Cross-Petition would have this Court believe that the Tile Dealers, in a relationship of dependency with Franciscan, did not ask Franciscan for assurances that Franciscan would stay in business, and that the dealers ignored the fact that their major supplier appeared to be failing and might not be able to fulfill its commitments to supply Franciscan tile. The Tile Dealers' statement of this case includes the full story, namely, that the Tile Dealers

requested and received repeated reassurances from Franciscan's top management that the company was not considering closure. These representations were made credible by Wedgwood's financial wherewithall to support Franciscan.

(b) The full facts of the case are set forth in the Tile Dealers' original Petition for Writ of Certiorari. Franciscan would have this Court believe that the decision to close a multi-million dollar business was made in a single day. The Tile Dealers have found evidence through discovery that proves otherwise. The Tile Dealers' Opposition to Franciscan's Motion for Summary Judgment shows that:

1. The Tile Dealers asked for and were given assurances, orally and in

writing, that Franciscan's plans were continued existence; and

2. That Wedgwood closed Franciscan after long forethought and planning.

The Tile Dealers are entitled to a hearing before a jury on the credibility of Franciscan's protestations of innocence.

REASONS WHY THE CROSS-PETITION AND THE ORIGINAL PETITION SHOULD BE GRANTED AND THIS COURT SHOULD HOLD THAT FRANCISCAN'S ALLEGED ACTS CONSTITUTE A PATTERN OF RACKETEERING ACTIVITY UNDER RICO.

The Tile Dealers agree with Franciscan that the question of what constitutes a "pattern of racketeering activity" after

Sedima, 105 S.Ct. 3275, needs to be decided by this Court in this case.

Various circuits of the Court of Appeals have adopted various views and tests, with great variations and conflicts between the circuits. These are set forth in Franciscan's Cross-Petition, at pp. 7-12.

The Third Circuit recently joined the Second, Ninth and Eleventh Circuits in holding that one "scheme" suffices for a RICO "pattern of racketeering activity", please see Barticheck v. First Union Bank (3rd Cir. 1987) 836 F.2d 36, 56 U.S.L.W. 2260.

The district courts are attempting to determine the law in this area following this Court's decision in Sedima and the pronouncements of the courts of appeals. The dockets of the district courts are

crowded with civil RICO cases and different results on the pleadings alone may well occur from one district court to another, and from one circuit to another.

This lack of uniformity encourages forum shopping, which this Court should act to prevent by ruling in this case.

Under Supreme Court Rules 17(a) and (c) this Court should hear this case in full, both Petition and Cross-Petition, and should decide the critical questions of law raised in the Petition and Cross-Petition.

I. THE PATTERN OF FRANCISCAN'S ALLEGED FRAUD CLEARLY FITS WITHIN THE RICO "PATTERN" ANALYSIS OF THE FIRST, FOURTH, TENTH AND ELEVENTH CIRCUITS.

While Franciscan agrees with the Ninth

Circuit that Franciscan's alleged pattern of fraud falls within the broad concept of "pattern" used by the Ninth Second, Third and Eleventh Circuits, Franciscan's alleged fraud also falls within the more flexible definitions of "pattern" used by the First, Fourth, Seventh and Tenth Circuits. It is untrue that, as suggested by Franciscan, the First, Fourth, Seventh and Tenth Circuits have "achieved the same result" as the multiple schemes test by adopting a single act "once is not enough" test (see Cross-Petition at p. 10). In Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986), the Seventh Circuit specifically rejected the multiple schemes test, and accepted a RICO complaint dealing with a fraud much more limited than that committed by Franciscan. The Morgan fraud was "a single grand scheme"

of "distinct acts taking place over a period of nearly four years." 804 F.2d at 976. The fraud was committed to induce investments in a single business venture.

As recognized by the Ninth Circuit, the Tile Dealers allege that Franciscan committed "at least twenty-four separate acts of mail and wire fraud." See opinion, 818 F.2d at 1469. The fraud affected all 142 Franciscan tile dealers nationwide, and specifically affected the five businesses and six individual plaintiffs who have joined in this lawsuit. As illustrated in the Tile Dealers' Declarations submitted with the court record in this suit, these frauds affected many distinct building projects on which the Tile Dealers had bid but which they could not follow through on due to lack of anticipated Franciscan tile.

The fraud also induced the Tile Dealers to make numerous purchases of tile for their inventory, all of which was rendered worthless upon Franciscan's closure. This pattern is far broader than the single fraudulent scheme in Morgan.

Similarly, the Franciscan fraud is more extensive than the alleged frauds rejected as not constituting RICO patterns in Condict v. Condict, 815 F.2d 579 (10th Cir. 1987), International Data Bank, Ltd. v. Zepkin, 812 F.2d 149 (4th Cir. 1987), and Roeder v. Alpha Indus., Inc., 814 F.2d 22 (1st Cir. 1987). Condict involved a family quarrel and fraudulent concealment of the assets of a family ranch. See 815 F.2d at 580. Roeder involved a single bribe paid in installments and executed through phone calls and letters. See 814 F.2d at 31. The International Data Bank

fraud was a false statement enclosed in a stock prospectus. Franciscan's fraud was a series of multiple misrepresentations which induced numerous tile sales, having many victims and affecting a large number of building projects. This pattern bears little resemblence to the schemes found too small or simple to be covered by RICO in the above-described cases. The Franciscan fraud would have been accepted by the First, Fourth, Tenth and Eleventh Circuits under their case-by-case approach to analysis of the RICO pattern requirement.

II. FRANCISCAN'S ALLEGED PATTERN OF FRAUDULENT ACTS CONSTITUTES A RICO PATTERN EVEN UNDER THE MORE STRINGENT REQUIREMENT OF MULTIPLE SCHEMES.

As acknowledged in Franciscan's Cross-Appellant's Brief, the most stringent test yet used for alleging a RICO pattern of racketeering activity is that originated by Judge Milton I. Shadur of the Northern District of Illinois (see Cross-Petition at p. 8). Judge Shadur rejected the idea that a single "episode" could constitute a RICO pattern, requiring instead that multiple criminal schemes be present for there to a violation of RICO.

But even Judge Shadur has recognized that fraud perpetrated on multiple victims constitutes a RICO pattern. As Judge Shadur stated in Papagiannis v. Pontikis, 108 F.R.D. 177, 179 (N.D.Ill. 1985), "...a malefactor's perpetration of fraudulent activities on **more than one victim**, while following the same modus operandi, is indeed a pattern for RICO purposes.

United States v. Yonan..."[1] Judge Getzendanner, also of the Northern District of Illinois, held that fraud causing **multiple injuries** is enough to make up a RICO pattern. In Heritage Ins. Co. of America v. First National Bank of Cicero, 629 F.Supp. 1412, 1416-17, a scheme to issue fraudulent escrow statements to induce an insurer to issue performance and payment bonds was held by Judge Getzendanner to be a RICO pattern, where "each alleged mailing instigated a

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(Emphasis added.)

[1] In United States v. Yonan, 622 F.Supp. 721 (N.D.Ill. 1985), payment of bribes by a lawyer to one person to fix ten separate criminal cases was held by Judge Shadur to establish a pattern.

new diversion of funds, and hence a new or separate injury. Because the separate diversions can be characterized as new criminal acts, not simply constituent mailings performed in the execution of a single transaction, the pattern requirement of RICO is satisfied..."

The Franciscan fraud satisfies both the multiple victims and multiple injuries tests. Franciscan victimized its 142 tile dealers, including the five businesses and six individuals who are plaintiffs in this suit. Multiple fraudulently-induced mailings of tile orders each constituted a separate injury. Valley Tile alone placed over 1,100 orders of tile as a result of the Franciscan pattern of fraud. Even under the most stringent of RICO pattern tests, the Franciscan fraud amounts to a clear violation of RICO.

III. THIS CASE PROVIDES A SUITABLE FACT PATTERN FOR CLARIFICATION OF THE RICO PATTERN REQUIREMENT.

The Ninth Circuit has summarized the conflict between the Federal Circuits in determining what constitutes a "pattern of racketeering activity" under RICO, 18 U.S.C. §1961(5). The alleged pattern of FRANCISCAN'S fraud involves multiple victims and multiple injuries. It consisted of ongoing activity over a considerable period of time, and provides the kind of continuity plus relationship which would present the "threat of continuing activity" which the RICO statute was designed to stop.

See the Senate Report on RICO, S.Rep. No. 91-617, 91st Cong. 1st Sess. 158 (1959) as quoted in Sedima, S.P.R.L. v.

Imrex Co., 105 S.Ct. 3275, 3285, Note 19.

The Ninth Circuit has correctly ruled in this case that "the plain words of RICO preclude" Franciscan's proposed approach to the statute's pattern of racketeering activity requirement. Please see 818 F.2d at 1469. The Tile Dealers respectfully submit that this Court should make clear that the Franciscan case involves the kind of allegations of white-collar fraud, by use of the United States mails and interstate telephone wires which RICO was designed to prevent.

CONCLUSION

For the reasons stated above, both Franciscan's Cross-Petition for a Writ of Certiorari and the Tile Dealers' Petition

for Writ of Certiorari should be granted.

DATED: November 25, 1987

Respectfully submitted,

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